Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1758

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS,
Petitioners,

vs.

AIRLINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO *et al.*, and AMERICAN AIRLINES, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The Association of Professional Flight Attendants petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

Opinions Below.

The opinion of the court of appeals (App. A, *infra*) is reported in unofficial reports at 17 F.E.P. 24 (7th Cir. 1978). The opinion has not yet been reported in official reports.

Jurisdiction.

The judgment of the court of appeals was entered on March 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented for Review.

Was the District Court's approval of a settlement agreement awarding retroactive seniority to flight attendants who had been formerly terminated by American Airlines an abuse of the Court's discretion for the following reasons:

(1) There was no evidence in the record indicating that the seniority system of American Airlines was not a bona fide seniority system.

(2) The Court did not require the Plaintiffs to demonstrate that they had complied with the timeliness requirements established by *United Airlines v. Evans,* 431 U.S. 553 (1977).

(3) The Court did not require Plaintiffs to produce concrete evidence regarding the impact of the settlement upon incumbent flight attendants.

(4) The Court did not require Plaintiffs to demonstrate that they would have been working during the period for which they are receiving retroactive seniority *but for* the termination by American Airlines.

Statutes Involved.

The relevant provisions of Title VII of the Civil Rights Act of 1964, as amended (78 STAT. 253, 42 U.S.C. Sections 2000e *et seq.*), are as follows:

> Section 703(h) (42 U.S.C. Section 2000e-2 (h)).

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the results of an intention to discriminate because of race, color, religion, sex, or national origin . . .
>
> Section 706(d), 42 U.S.C. Section 2000-5(d) (1970).
>
> A charge under subsection (a) shall be filed within 90 days after the alleged unlawful employment practice occur . . .

Statement of the Case.

A. The District Court Proceedings.

The original suit in this matter was filed in the District Court in 1970 by the Airline Stewards and Stewardesses Association, the predecessor of Petitioner APFA as the exclusive bargaining representative for flight attendants employed by American Airlines. The suit alleged that the employer had engaged in sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964, as amended, by terminating flight attendants who became pregnant.

Upon appeal of a settlement, the Seventh Circuit Court of Appeals remanded the case for trial. (*Airline Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), cert. denied sub nom. *Airline Stewards and Stewardesses Association, Local 550 v. Zipes*, 416 U.S. 993 (1974).

Subsequent to remand, a settlement was reached between the Plaintiff class and American Airlines. Prior to the hearing in which court approval for the settlement was sought, the Association of Professional Flight Attendants (hereafter referred to as APFA), intervened in order to protect the interests of the incumbent flight attendants.

APFA posed no objection to the back pay settlement nor to the reinstatement of the Plaintiff class members. The sole objection raised by APFA was directed against the award of retroactive seniority to the returning class members.

More specifically, APFA objected to Section V B of the settlement agreement which provided that class members would be awarded retroactive occupational seniority. The basis of APFA's objection was that the award of retroactive occupational seniority would have the effect of depriving incumbent employees of rights given by collective bargaining agreement in such areas as the order of layoff and re-hire, promotional opportunities, and the choice of flights and home bases.

On October 3, 1977, a hearing was held by the District Court regarding APFA's objection to the settlement agreement. At that time, the claim process by the class members was not yet complete. The court did not yet know exactly how many class members desired to return to employment with American Airlines. Similarly, because the Plaintiffs presented no evidence regarding which bases or which flights would be assigned to the returning class members, the court was presented with no evidence regarding the impact of the settlement upon the presently employed flight attendants.

However, the Court accepted a representation by Counsel for the Plaintiffs that no incumbent flight attendant would lose his or her job as a result of the settlement. Based upon this representation, the Court approved the settlement agreement and overruled APFA's objection.

B. The Decision of the Court of Appeals.

The court of appeals affirmed the district court's approval of the settlement agreement. (App. A, *infra.*) The court of appeals held that review of the district court's actions should be judged "on the basis of legal principles regulating judicial review of settlement agreements" rather than on the basis of Title VII law.

Applying this principle, the Court rejected APFA's contention that the Court should have required Plaintiffs to demonstrate compliance with the timeliness requirements of *United Airlines, Inc. v. Evans, supra,* or that Plaintiffs should have demonstrated compliance with the conditions precedent for the award of retroactive seniority, as required by *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977).

The Court also held that the district court was not obligated to require precise information with respect to the changes in the working life of incumbent flight attendants which would result from the settlement.

REASONS FOR GRANTING THE WRIT.

The decision of the court of appeals constitutes a serious departure from the established body of Title VII law which safeguards the seniority rights of employees innocent of any wrongdoing. In evaluating the actions of the district court in terms of the principles controlling settlement agreements, rather than using the principles of Title VII law, the court of appeals has deprived the presently employed flight attendants of American Airlines rights guaranteed by decisions of this Court.

Moreover, the district court's approval of the settlement agreement and the court of appeals affirmance raises the important question of whether the established limitations upon recovery in Title VII actions can be ignored when a case is resolved by settlement rather than by full litigation.

1. In *United Airlines, Inc. v. Evans,* 431 U.S. 553 (1977) this Court fashioned the following rule regarding the right to obtain relief based upon an untimely Title VII charge:

> "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed."

The Plaintiff class includes flight attendants terminated since July 2, 1965. Yet, the charge which was the basis for the original lawsuit in this matter was filed in 1970. In using the principles governing settlement agreements, rather than Title VII law, the court of appeals gutted the *Evans* rule. Since the district court did not require evidence about which members

of the class were entitled to relief under the Evans rule, the effect of the Court of Appeals decision is to allow class members to receive an award of retroactive seniority despite the fact that their claims may be barred by the *Evans* rule.

Settlement of a Title VII action has a different impact than the ordinary settlement. The settlement of this case affects the employment rights of numerous flight attendants presently employed by American Airlines. They have different and competing interests as compared with the returning class members.

Consequently, the failure of the Court of Appeals to use Title VII law, including the *Evans* rule, deprives working employees of the protection which is afforded them by the decisions of this Court.

This defect in the court of appeals decision is illustrated by the court's handling of the issues raised by this Court's decision in *International Brotherhood of Teamsters v. U.S.,* 431 U.S. 324 (1977).

In the *Teamsters* case, this Court held that when fashioning a remedy which will impact upon a bona fide seniority system within the meaning of Section 703(h) of the Civil Rights of Act of 1964, as amended, a trial court must identify which employees were victims of discrimination and, further, the Court must adjust the remedial interest of discriminatees and the legitimate expectations of employees innocent of any wrongdoing.

In the instant case, the only evidence regarding the seniority system presented to the district court at the settlement hearing was the affidavit of Colleen Brenner filed on behalf of APFA. (App. B, *infra.*) This affidavit indicates that the alleged discriminatory prac-

tices which were the basis for Plaintiffs' claims had been eliminated from the seniority system in 1970.

Thus, the unrebutted evidence before the district court showed that the remedy being awarded the Plaintiff class members occurred in the face of a bona fide seniority system, contrary to the rule established in the *Teamsters* case. (See, *e.g., Southbridge Plastics Division v. Local 759 International Union of Rubber Workers*, 565 F.2d 913 (5th Cir. 1978).)

Moreover, the award of retroactive seniority violates the established principle that the recipient of such a remedy must demonstrate that he or she suffered or potentially suffered discrimination.

In the *Teamsters* case, *supra,* the Supreme Court reviewed the circumstances under which an award of retroactive seniority can be made. The following portion of the Supreme Court's decision is particularly relevant for the instant case:

> "A nonapplicant must show that he was a potential victim of unlawful discrimination. Because he is necessarily claiming that he was deterred from applying for the job by the employer's discriminatory practices, his is the not always easy burden of proving that he would have applied for the job had it not been for those practices." (52 L.Ed.2d 396, 435.) (Emphasis supplied.)

The instant case does not involve "nonapplicants" for flight attendant's jobs. However, this case involves the analogous situation of Plaintiffs who claim that they would have been working *but for* the alleged discriminatory discharge.

APFA respectfully submits that, on the basis of the *Teamsters* decision the district court was obligated to determine whether, in fact, the Plaintiffs would have been working during the years between pregnancy and the settlement of this lawsuit.

Without any showing that a class member tried to work during those years, it can only be assumed that the class member was content to be a housewife caring for her child. Such an inference could be rebutted by such evidence as a showing that the Plaintiff applied for jobs at other airlines, or attempted to return to work at American Airlines.

However, since the court did not require such a showing, it is quite likely that many Plaintiffs have received a windfall of a retroactive seniority award for years during which those Plaintiffs would not have been working, even if they had not been terminated. Under the *Teamsters* decision, such a windfall is forbidden.

2. This Court has acknowledged the crucial role that seniority plays in the economic employment system of this country. *Franks v. Bowman Transportation Company*, 424 U.S. 747, 766 (1976).

With respect to flight attendants, seniority is still more determinative of employment rights than in other industries in the economy. Every aspect of a flight attendant's job, including work schedules, home bases, vacations and layoff are arranged on the basis of seniority. The decision of the court of appeals does not only affect the employment of incumbent flight attendants of American Airlines. Rather, by approving the award of retroactive seniority without fulfilling the requirements of Title VII law and without requiring

information regarding the precise impact of the settlement in American Airlines' seniority system, the decision of the court of appeals threatens the principles established to strike the delicate balance between alleged discriminatees and working employees innocent of any wrongdoing.

Conclusion.

The Petition for a Writ of Certiorari should be granted.

DATED: June 9, 1978.

Respectfully submitted,

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LEVY, KOSZDIN, GOLDSCHMID & SROLOFF,
A Professional Corporation,
Attorneys for Petitioners.

APPENDIX A.

Opinion of the Court of Appeals.

In the United States Court of Appeals, for the Seventh Circuit.

Airline Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO et al., Plaintiffs-Appellees, v. American Airlines, Inc., Defendant-Appellee, and Association of Professional Flight Attendants, Intervenor-Appellant. No. 77-2098.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 70 C 2069—Frank J. McGarr, *Judge*.

ARGUED JANUARY 26, 1978 — DECIDED MARCH 14, 1978.

Before FAIRCHILD, *Chief Circuit Judge*, PELL and SPRECHER,* *Circuit Judges*.

PER CURIAM. The issue in this case is whether the district court abused its discretion by approving the settlement of a case under Title VII of the Civil Rights Act of 1964[1] without litigating the merits of the plaintiffs' claims and by not requiring a full evidentiary hearing on the effect of the settlement on the interests of the defendant's incumbent employees.

I

The plaintiffs in this case are a certified class composed of all female persons employed as flight cabin attendants whose employment with the defendant,

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*Although Judge Sprecher heard oral argument, he later disqualified himself from any further consideration of this case.

[1]78 Stat. 253. Title VII, as amended, is codified in 42 U.S.C. § 2000e *et seq*.

American Airlines, was terminated due to their having children on or after July 2, 1965. The intervenor, the Association of Professional Flight Attendants (APFA), is the exclusive bargaining agent for those attendants presently employed by American Airlines.

This suit was filed in 1970 in response to the defendant airline's policy of terminating stewardesses who became pregnant or adopted children and not allowing women with children to work as stewardesses. The suit[2] was brought by the Air Line Stewards and Stewardesses Association (ALSSA), the intervenor's predecessor as the bargaining representative of defendant's flight cabin attendants. The ALSSA entered into a settlement agreement with defendant which provided neither back pay nor retroactive seniority to those attendants who had been discharged under defendant's policy. That agreement was approved by the district court, but reversed by this court. *Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied sub nom. Air Line Stewards & Stewardesses Ass'n, Local 550 v. Zipes*, 416 U.S. 993 (1974).

On remand, after discovery and extensive briefing, the district court granted plaintiffs' motion for summary judgment. Defendant appealed that judgment to this court,[3] but during the briefing for that appeal, a settle-

[2]This suit was not the first one filed in response to defendant's policy of terminating stewardesses who became mothers. In 1967, Bernice Hillgruber filed a charge with the Equal Employment Opportunity Commission. Two years later, she filed a class action in California. In October 1969, Bonnie Pulskamp and others also filed EEOC charges against defendant.

[3]That appeal was originally filed jointly with Trans World Airlines in appeal number 77-1325 which was argued the same day as this appeal but is still pending. TWA has continued its appeal and American has remained in the appeal pending the resolution of the settlement issue. In light of our disposition

ment was reached. The settlement provides, *inter alia*, for the payment of cash, the restoration of accrued company seniority and provision for the court to decide whether occupational seniority[4] was appropriate if the APFA did not agree to a full restoration of that latter type of seniority.

The APFA filed a motion to intervene and requested a hearing on its objections to the settlement. The district court recognized that "for a complete resolution of the issues that arise out of this proposed settlement, that the Union should have a voice concerning it" and therefore, the court granted APFA's motion and conducted a hearing on the issues raised (Tr. at 2).

At the hearing, the intervenor declined to present any evidence, but instead argued orally on behalf of the incumbent employees' rights.[5] Intervenor's only

of this case, we assume that American will remove itself from that appeal.

We might note that the procedures that led to the approval of this settlement by the district court were somewhat unusual. While the briefs were being written for the appeal in 77-1325, American Airlines and the plaintiff class reached a tentative settlement agreement. Since TWA was proceeding on with its appeal, there was no need to seek a halt to the appeal while the district court evaluated the settlement. Thus, plaintiffs and American filed the settlement agreement with the district court. It held a hearing and approved the settlement during the same time that the appeal in 77-1325 was proceeding in this court. We believe that the parties acted appropriately to guarantee the interests of all concerned with the settlement.

[4]None of the parties in this appeal explained very fully the difference between the two types of seniority, especially the use made of company seniority. Intervenor listed the following as the benefits controlled under the collective bargaining agreement by length of occupational seniority: choice of flight, choice of status, promotional opportunities and rate of pay. Thus, it is clear that occupational seniority is an important part of the settlement agreement both for the returning and the incumbent flight attendants.

[5]Some of the details of the hearing are described in part III of this opinion *infra*.

complaint with the agreement was its provision for full retroactive "occupational seniority" for those flight attendants seeking reinstatement. Since occupational seniority is used under the collective bargaining agreement as the basis for determining many working conditions, *e.g.*, choice of bases and order of lay-off, intervenor argued that the granting of this relief would be an onerous burden on the incumbent employees. After the intervenor's argument, the court stated that "the equities are on the side of approving the settlement agreement. . . . I think it is the best and most equitable result we can achieve in the case." Subsequently, the court entered an order approving the settlement agreement and providing for the restoration to those plaintiffs requesting reinstatement of their accrued occupational seniority from the time of their discharge. Intervenor appeals that judgment.

II

Intervenor initially argues, relying on *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977), that the district court erred in not requiring each plaintiff to demonstrate that her claim is not time barred under 42 U.S.C. § 2000e-5(d) (1970).[6] Intervenor also argues, relying on *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), that the district court erred in not requiring each plaintiff to prove that she would have continued in employment in the years between her pregnancy and the settlement but

[6]Prior to the 1972 amendments to Title VII, the Act provided that "[a] charge . . . shall be filed within ninety days after the alleged unlawful employment practice occurred. . . ." 78 Stat. 260. The amendments added a new subsection (a) to § 706. Consequently, subsection (d) was redesignated as subsection (e). At the same time, it was amended to enlarge the limitations period to 180 days. 42 U.S.C. § 2000e-5(e).

for the defendant's wrongful termination. While we believe that in a controverted Title VII case the issues raised by intervenor would be both difficult and interesting, we must recognize that we are here reviewing the propriety of a settlement and not a judgment rendered after a trial. We believe that the issues raised by the intervenor should not be decided on the basis of Title VII law, but rather must be decided on the basis of legal principles regulating judicial review of settlement agreements. Relying on those principles, we conclude that the district court correctly declined to decide those issues relevant to the merits of the plaintiffs' claims prior to deciding merely whether the settlement agreement was appropriate.

It is a well-settled principle that the law generally favors the encouragement of settlements. *See Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960). That general rule has been recognized as applicable to settlements in Title VII cases. *Patterson v. Newspaper & Mail Deliverers Union of N.Y. & Vicinity*, 514 F.2d 767, 771 (2d Cir. 1975), *cert. denied sub nom. Larkin v. Patterson*, 427 U.S. 911 (1976). In fact, one court has concluded that it is "the clearly expressed intent of that Act to encourage settlements." *Flinn v. FMC Corp.*, 528 F.2d 1169, 1174 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976). *See also Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).

In addition, it is generally recognized that settlements are entered into because of "the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense. . . ." *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960). Based on these considerations, this court

has held that a district court in reviewing a settlement agreement "should not attempt to decide the merits of the controversy . . . [because] [a]ny virtue which may reside in a compromise is based upon doing away with the effect of such a decision." *Patterson v. Stovall*, 528 F.2d 108, 114 (7th Cir. 1976). *See generally* Note, *Factors Considered in Determining the Fairness of a Settlement*, 68 NW. U.L. REV. 1146, 1154 (1974).

Applying these general principles to this case, we believe the district court correctly declined to decide the merits of each of the plaintiffs' claims. Intervenors essentially ask this court to require in excess of 100 mini-trials on issues dealing with the adequacy of each plaintiff's complaint and the availability of defenses. It seems to us beyond serious dispute that no reasonable parties are going to settle any case if an intervenor can force them to litigate separately the merits of each claim. The rule urged by the intervenor would most seriously discourage efforts to settle Title VII cases, and we refuse to sanction such a result.

The only argument that intervenor offers to support a contrary result is that the district court had a duty to consider the interests of the incumbent employees before approving the settlement. *See Mandujanao v. Basic Vegetable Products, Inc.*, 541 F.2d 832, 837 (9th Cir. 1976); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 289, 293 (N.D. Cal. 1976). We have no quarrel with that general proposition, but it certainly does not lead to the conclusion that the court had a duty to litigate the merits of the plaintiffs' claims prior to approving the settlement. At most the court was required to permit APFA to intervene and offer it an opportunity to present to the court is members' interests in the proposed remedy. This intervenor had an opportunity to do. The district court was required to do no more. *See EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 173 (3d Cir. 1977) (interests of a third party in a consent decree limited to appropriateness of the remedy).

III

Intervenor's final argument is that the district court abused its discretion by approving this settlement without sufficiently apprising itself of the facts as to the settlement's impact on the incumbent employees. To evaluate this contention, we must focus in some detail on what transpired at the settlement approval hearing.

At the beginning of the hearing, the court recognized explicitly the importance of having the APFA's members' interests represented and thus permitted the union to intervene. Then, the court acknowledged that the intervenor had witnesses available and, although it did not encourage having them testify, it seems clear from the record that the court was willing to permit intervenor to make an offer of proof. Intervenor's counsel, in turn, stated that "[i]f we can avoid it, I think we would be better off . . ." (Tr. at 3).

The district court then permtted both sides to argue as to the likely effect of this agreement on the incumbent employees. It was established that the parties' best estimate was that at most 150 flight attendants[7]

[7]Intervenor makes much of the fact that this number was merely an estimate. We find that fact to be of little significance. First, intervenor does not suggest that subsequent events have shown the estimate to be substantially incorrect. Second, even if all the class members sought reinstatement, the number would still be less than 300. Intervenor did not argue before the district court nor before this court that any undue burden would attend the infusion of even that many new employees into the present work force.

would seek reinstatement and that there were about 5000 incumbent flight attendants. Thus, the numerical impact of the agreement appeared to be minimal. In addition, the court was told that a flight attendant "who wishes to go back to work will only be assigned to a base when there is an opening in that base and the people will be assigned to that base over a rather lengthy period of time . . ." (Tr. at 7-8). The court finally was informed that no incumbent flight attendant would lose his or her job as a result of the agreement (Tr. at 7). Based on these considerations, the court decided that the settlement was fair and that it should be approved.

In assessing that conclusion, we should make clear at the outset what legal standard should guide a district court's determination of whether this remedy is appropriate in the face of a challenge by incumbent employees. We believe that in this type of a settlement case, the Supreme Court's standard as to the appropriateness of "competitive status"[8] seniority announced in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), applies with full force.[9] *Cf. United*

[8]"Competitive status" seniority as described in *Franks* is the equivalent of "occupational" seniority as used in defendant's collective bargaining agreement with intervenor.

[9]We do not decide the extent to which *Franks* should be used as a guide in a traditional settlement case where there are dissident members of a class of discriminatees. It may well be that the minority members of the class will have to forego the full retroactive competitive seniority provided in *Franks* so that the majority may acquire some benefits and yet avoid the costs and uncertainties of litigation. Such a decision would have to be made on a case-by-case basis.

Here, however, we deal with a case where settlement was reached subsequent to the entering of summary judgment against the defendant. The plaintiffs have almost earned through full litigation the remedy proposed in *Franks* and adopted in this settlement. The only impediment to that remedy here is the

States v. Trucking Employers, Inc., 561 F.2d 313, 317 n.15 (D.C. Cir. 1977). In *Franks*, the Court held:

> [D]istrict courts should take as their starting point the *presumption* in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of *unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases.*

424 U.S. at 779 n.41 (emphasis added). Thus, contrary to intervenor's contention that the burden at the hearing was somehow on the district court to determine on some abstract basis the fairness of the settlement, we conclude that the burden was on the intervenor to demonstrate some "unusual adverse impact" that justified not permitting full retroactive seniority.

Examining the district court's action in light of this standard, we find that there was clearly no abuse of discretion. First intervenor declined to make any evidentiary showing at the hearing of an "unusual adverse impact" that this relief would create. In fact, intervenor in the arguments made to this court has still not suggested in anything more than conclusory statements how this settlement will unduly disadvantage the incumbent employees who might not even be employed but for the injury done to the plaintiffs.

intervenor's complaint. The interests of the intervenor's members are identical to those of the incumbent employees in *Franks* that were given such little weight by the Supreme Court. The fact that this case was settled rather than fully litigated is of no consequence to the appropriateness of applying *Franks* as the basis for guiding the district court's discretion.

Second, the district court made an admirable effort to sort out the likely impact of and the "balance of equities" surrounding the provision of retroactive occupational seniority. It assured itself that no present employees would lose their positions because of this agreement and also that the number of returning employees was not so large as to create undue problems. On the record before us, we find not the slightest basis for concluding that the court abused its discretion.

For these reasons, we believe that the district court's judgment approving the settlement agreement must be AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B.

Affidavit of Colleen Brenner.

State of California, County of Los Angeles—ss.

COLLEEN BRENNER, being first duly sworn deposes and says:

I am a National Officer of the Association of Professional Flight Attendants, a labor organization. My official title is Division Representative, Eastern Division 1. By virtue of holding this office I am also a member of the Board of Directors of the Association of Professional Flight Attendants. I have held this position since May 16, 1977 when APFA was certified by the National Mediation Board as the collective representative of flight attendants employed by American Airlines, Inc.

Prior to May 16, 1977 and since March, 1962 I have been employed as a flight attendant by American Airlines, Inc. During that period I have been a member of Transport Workers' Union Local 550, AFL-CIO and its successor Transport Workers' Union Local 552, AFL-CIO. For the period between 1962 and May, 1977 I have held various offices in either Local 550 or Local 552. I have been chairperson of the Los Angeles base on behalf of Local 552, have been a member of the Executive Board of Local 552, I have been on the negotiating committee of Local 552.

As a result of my membership in the two TWU locals, Locals 550 and 552 and the various offices I have held in said locals, I have personal knowledge and am familiar with the history of the negotiations and agreements between American Airlines, Inc. and the various locals that have represented flight attendants employed by American Airlines, Inc.

On October 9, 1970, Local 550, TWU, AFL-CIO and American Airlines, Inc. entered into a letter of agreement dealing with the question of stewardesses who become pregnant. This letter of agreement became a part of the general collective bargaining agreement and was attached thereto. The letter of agreement dated October 9, 1970 between American Airlines, Inc. and Local 550, TWU, AFL-CIO is attached hereto and marked Exhibit "A".

Following the above-referred to letter of agreement chronologically the next general agreement entered into between American Airlines, Inc. and Transport Workers' Union Local 552 (which succeeded Local 550 as the representative of flight attendants employed by American Airlines, Inc.) was an agreement which became effective May 27, 1974. In the agreement of May 27, 1974 there was a section entitled "Article 16—Leaves of Absence". This Article 16 dealt with the question of stewardesses who became pregnant beginning at sub-paragraph (d)(1). The provisions of this section are attached hereto and marked Exhibit "B".

Also attached to the agreement of May 27, 1974 was a letter of agreement referred to as "Appendix L" dated May 27, 1974. This supplemental letter of agreement referred to in the contract as "Appendix L" is attached hereto in its entirety and is marked Exhibit "C".

The above-referred to documents set forth in its entirety the provisions of the collective bargaining agreement between the TWU locals and American Airlines, Inc. except for the current agreement which contains language dealing with stewardesses who become pregnant and their rights and obligations and the terms and provisions of the current agreement are fully set forth in the Memorandum of Points and Authorities in Support of Motion to Intervene filed on behalf of APFA concurrently herewith.

I swear under penalty of perjury that the foregoing is true and correct.

Signed at Los Angeles, California, September 14, 1977.

/s/ Colleen Brenner
COLLEEN BRENNER

Subscribed and sworn to before me this 14th day of September, 1977.

/s/ Harriette E. Terry
Notary Public in and for said County and State.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of June, A.D. 1978.

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Supreme Court, U. S.
FILED
JUL 11 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1758

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS.

Petitioners,

vs.

AIRLINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, ET AL., AND AMERICAN AIRLINES, INC.,

Respondents.

RESPONSE OF PLAINTIFF-RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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AIRLINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, ET AL., AND AMERICAN AIRLINES, INC.,

Respondents.

RESPONSE OF PLAINTIFF-RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Plaintiff (Darlene Preston), as representative of the Plaintiff Class, urges that the petition for certiorari be denied.

STATUTE INVOLVED.

§ 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) (1970):

> "If the court finds that the [employer] has engaged in . . . an unlawful employment practice . . . the court may . . . order such affirmative action as may be appropriate, which may include reinstatement . . . with or without backpay . . .".

§ 706(g) of Title VII, 42 U. S. C. § 2000e-5(g) (as amended by Pub. L. 92-261, § 4(e), 1972):

> "If the court finds that the [employer] has engaged in . . . an unlawful employment practice . . . the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . with or without backpay . . . or any other equitable relief as the court deems appropriate."

STATEMENT OF THE CASE.

This suit arose out of American Airlines' practice of firing stewardesses upon their becoming mothers (either by childbirth or adoption). Various individual stewardess-mothers filed charges with the Equal Employment Opportunity Commission ("EEOC") in August 1967 and October 1969, following which a timely class action suit was filed on behalf of all similarly situated stewardesses.* On May 31, 1970, an additional EEOC charge was filed by the union,** following which the union filed this suit on behalf of the previously fired stewardesses as well as the currently employed union members. The union proposed to the District Court a settlement which provided neither backpay nor retroactive seniority, in connection with which the union obtained certification of a class which included all stewardess-mothers who had been fired after July 2, 1965*** and prior to August 1, 1970. The settlement agreement was made without the union's lawyers having consulted any class member or even any of the named plaintiffs. *Air Line Stew. & S. Ass'n., Loc. 550* v. *Amer-*

* The class action based on the 1967 EEOC charges was filed in the Middle District of California and was later stayed in deference to this case.

** Petitioner and its predecessors, each of which was the representative of American Airlines' flight attendants (see Pet'n 3), are collectively referred to herein as "the union." Thus defined, the union continuously represented the same constituency of employed flight attendants.

*** July 2, 1965 was the effective date of the Civil Rights Act of 1964, 42 U. S. C. § 2000 *et seq.*

ican Airlines, Inc., 490 F. 2d 636, 638 (7th Cir. 1973), *cert. den.*, 416 U. S. 993 (1974). The union and American Airlines collaborated in drafting and distributing notice to the class, which contained no opt-out provision. Over the objections of various class members, the District Court approved the settlement. On appeal, the Seventh Circuit noted that the interest of the union members (all of whom were currently employed) was in conflict with the retroactive seniority interests of the previously fired stewardesses. The Seventh Circuit held that the conflict rendered the union an inadequate class representative and that the class members had been denied their opt-out privileges. The order approving the settlement was reversed, with instructions to replace the union as class representative. *Air Line Stew. & S. Ass'n, Loc. 550, supra.*

On remand, the union was ousted as class representative. The new class representative conducted discovery and made a motion for summary judgment on the merits. American contested the motion for summary judgment and challenged the scope of the membership in the class,* in the course of which the following issues were litigated:

1. Whether the August 1967 and October 1969 EEOC filings covered the class members;
2. Whether the August 1970 EEOC filing covered all class members by virtue of a continuing violation;
3. The effect of American's prior explicit waiver (in open court) of all limitations defenses;
4. Whether American's conduct estopped it from asserting time-limit defenses; and
5. Whether American's pleading of limitations defenses, injected for the first time after the Court of Appeals invalidated the settlement, was timely and complied with the conditions imposed by the District Court.

* The union sought leave to intervene and tendered a memorandum which supported American's limitations arguments. Intervention was allowed on the condition that the union first give Rule 23(c)(2), F. R. C. P., notice to the union members. The intervention was abandoned.

Summary judgment was granted and the motion to restrict the class was denied. The District Court ordered that all stewardess-mothers who had been fired on and after July 2, 1965 were entitled to class membership. American Airlines appealed from the summary judgment order and from the order which ruled on the time-limits issues. The union did not appeal. During the pendency of the appeal, American Airlines reached a settlement with the class. The settlement provided for backpay and (in the absence of the union's agreement) left to the Court under § 706(g) the question of retroactive seniority. (Resp. App. 5)* Sworn claim forms were required, giving data as to seniority dates, dates of employment and termination and other historical data. The agreement provides that subsequent pregnancies and other periods of disability will be deducted from accrued seniority.

The union was permitted to present its position on the seniority issue. At the § 706(g) hearing, the union admitted that there are 5400 incumbent flight attendants (Resp. App. 17) compared with less than 300 class members, of whom probably only 150 would seek to return. The Court also noted that the settlement provided for assigning returnees only upon existence of a vacancy, thus ensuring that no incumbent will lose her job because of the return of class members.

At the § 706(g) hearing, the union made no challenge to the merits of any claim, for lack of timeliness or on any other ground. The union neither offered any evidence nor suggested that any further evidence was required. Its entire presentation consisted of an objection to *any* award of seniority because it would affect some of the union members. (Resp. App. 29-32)

On October 4, 1977, the District Court exercised its authority under § 706(g) and awarded retroactive seniority to those class members who will return to American Airlines under the settlement (viz., those class members who desire to return and who pass the physical qualifications and successfully complete retraining courses).

* References to Petitioner's Appendix are cited as "(Pet. App. .....)"; references to Respondent's Appendix are cited as "(Resp. App. .....)".

QUESTIONS PRESENTED.

I.

Whether the District Court abused its discretion under § 706 (g) in awarding retroactive seniority to those of 300 class members who wish to return to a work force which numbers 5400 flight attendants, where none of the incumbents would be displaced by any returning class member and the union, representing the incumbents, offered no evidence or arguments in the District Court in any attempt to demonstrate an unusual adverse impact caused by the restoration of seniority.

II.

Whether the union is entitled at a § 706(g) hearing on seniority to challenge the validity of the class members' claims and require proof as to (a) each class member's willingness, readiness and ability to work and (b) each class member's timeliness in filing an EEOC charge, even after those issues were litigated to summary judgment, appealed by the employer and then settled on appeal.

III.

Whether the union, having abandoned an opportunity to present the same points prior to summary judgment and thereafter having failed to take a timely appeal, can re-argue those issues at a § 706(g) hearing.

IV.

If the answers to the foregoing three questions are all in the affirmative, whether or not the union may raise those issues for the first time on appeal, not having advanced those points at the § 706(g) hearing in the District Court.

V.

Whether, in any event, the union should be barred from challenging the rights of the class members because of the previous conduct of representatives of the incumbents in the same case.

ARGUMENT.

I.

The Union Made No Attempt to Satisfy Its Burden of Showing an Unusual Adverse Impact Upon Incumbent Stewardesses.

In arguing that the District Court erred in awarding retroactive seniority without requiring more evidence, Petitioner places the burden with the wrong party.

One of the vital purposes of Title VII is to make persons whole for injuries suffered on account of unlawful employment discrimination. *Albemarle Paper Company* v. *Moody*, 422 U. S. 405, 418 (1975). For that reason, in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 96 S. Ct. 1251 (1976), this Court viewed § 706(g) as vesting broad discretionary power in district courts to determine seniority remedies.

Several principles appear in *Franks* which demonstrate that only in the extraordinary case will retroactive seniority be denied. First, competitive seniority is so important that without it being restored a Title VII victim may well be denied adequate relief. 96 S. Ct. at 1264-1265. Second, restoration of seniority is required to achieve the "make whole" purposes of the Act. (*Ibid*) Third, the District Court has not merely the power but the duty to fashion an award which will eliminate the discriminatory effects of the past. 96 S. Ct. at 1266. Fourth, the party who opposes the award of seniority has the burden of showing that extraordinary circumstances ("*unusual* adverse impact") justify the withholding of seniority. 96 S. Ct. at 1271, n. 41.

The union did nothing in the District Court to satisfy its heavy burden except to argue that "innocent" incumbents should not be disadvantaged—a notion which this Court explicitly rejected in *Franks*. 96 S. Ct. at 1269.* The mere fact that the incumbents are "innocent" cannot operate to prevent the restoration of returning victims to rightful place seniority. Otherwise, the presumption mandated in *Franks* would be enviscerated.

II.

The District Court Properly Exercised Its Discretion Under § 706(g).

In any event, all of the factors which were before the Court militated in favor of retroactive seniority. If *all* of the class members were to return, they would comprise less than 6% of the total flight attendants. Moreover, class members will be re-employed only where vacancies exist; no incumbent will lose her job because of the return of a class member. Far from having an "unusual adverse impact," the award will cause only routine disadvantage to the incumbents, and then only to a *de minimus* extent. Under these circumstances, the District Court could not have withheld retroactive seniority.

United Airlines v. *Evans*, 431 U. S. 553 (1977), is inapposite. *Evans* involved a challenge to the validity of a seniority system which allegedly perpetuated the effects of an old discrimination which was no longer actionable. This Court held that the delayed effect of the seniority system did not operate to continue the original violation. The instant case involves no challenge to American's seniority system but, rather, has caused slight modifications in the seniority list, as inevitably occurs in any "make whole" restoration of seniority.

Independent of any continuing violation theory, the District Court would have been correct in refusing a union request (had

* As in *Franks*, the incumbent flight attendants succeeded to the jobs from which the class members were illegally ousted. The union's current members thus have benefited from American's violation.

one been made) to require each class member to furnish any further proof of timeliness than the record already contained. The August 1967 EEOC filing relieved all but 19 class members of the burden of filing separate charges. See *Albemarle Paper Company* v. *Moody*, 422 U. S. 405, 415 (fn. 8), 95 S. Ct. 2362, 2370 (fn. 8) (1975); *Bowe* v. *Colgate Palmolive Co.*, 416 F. 2d 711, 720 (7th Cir. 1969). In addition, (1) all of the class members were entitled to the explicit waiver of the limitations defense which American's lawyer earlier had made in open court, (2) the conduct of American and the union operated to estop them from invoking limitations defenses, and (3) the violation which operated to bar the former stewardesses from employment continued until after this case was filed.*

The union incorrectly argues that under *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324, 97 S. Ct. 1843 (1977), each stewardess should have been required to prove that she would have continued working but for the no-mothers policy. Even if the union had made that request in the District Court, it properly would have been denied. In *Teamsters*, this Court's admonition that "a non-applicant must show that he was a potential victim," 97 S. Ct. at 1868, related to *unidentified* potential claimants. Every class member in this case is a former stewardess, each of whom is (a) an identified victim and (b) qualified for the job. Moreover, the burden rests upon the opponent of Title VII claimants to demonstrate that the claimants were *not* in fact victims of previous discrimination. 97 S. Ct. at 1866-1867; see also *Franks*, 424 U. S. at 772, 96 S. Ct. at 1268.

* In *Evans*, the violation ended (when the no-marriage policy was abandoned) long before an EEOC charge was filed. In the case *sub judice*, even the August 1970 EEOC charge was timely because at that point American's no-mothers policy was still in force.

III.

The Union Had No Right to Challenge the Class Members' Claims.

The union filed this suit and then attempted to settle the case without any award of seniority. With that agreement in hand, the union sought and obtained a dragnet class definition which included all stewardesses fired after July 1, 1965. The original settlement now having been replaced with one which provides a real remedy for the class members, the union takes the opposite side and attacks the validity of the class members' claims. A class representative has a fiduciary obligation to all class members. *Guttman* v. *Braemer*, 51 F. R. D. 537, 540 (S. D. N. Y. 1970). See also *Norman* v. *Arcs Equities Corp.*, 72 F. R. D. 502, 506 (S. D. N. Y. 1976); *Rothman* v. *Gould*, 52 F. R. D. 494 (S. D. N. Y. 1971). Having once posed as the representative of the class, the union's shift to the opposite side should not be tolerated.*

Putting aside the union's duplicity, it cannot now attack the class for the separate reason that prior to summary judgment and prior to denial of the motion to limit the class, the union was granted leave to present its timeliness and willingness-to-work arguments but voluntarily abandoned that opportunity. The union failed to appeal from those orders, which are now *res judicata* vis-a-vis the union.

Thereafter, this settlement was reached, following which the District Court held the § 706(g) hearing. At the § 706(g) hearing, the union failed to advance any arguments concerning the § 706(d) period of limitations or the class members' willingness to work after being fired. For this additional reason, the union is precluded from review. See *Country Fairways, Inc.* v. *Mottaz*, 539 F. 2d 637, 642 (7th Cir. 1976); *Cannon* v. *U. S. Acoustics Corp.*, 532 F. 2d 1118, 1119 (7th Cir. 1976); *Hamilton Die Cast, Inc.* v. *United States F. & G. Co.*, 508 F. 2d 417,

* The title of this case ironically reflects the union's turnabout.

420 (7th Cir. 1975); *Desert Palace, Inc.* v. *Salisbury*, 401 F. 2d 320, 324 (7th Cir. 1968); *Wagner* v. *Retail Credit Company*, 338 F. 2d 598, 601-602 (7th Cir. 1964).*

Finally, even if the union were a newcomer to this case, it would be precluded from challenging the validity of the class members' claims. The objection of even a third-party-stranger must be limited to the appropriateness of the remedy. *EEOC* v. *American Tel. & Tel. Co.*, 556 F. 2d 167, 173 (3d Cir. 1977). Otherwise, every settlement hearing would re-litigate the merits of the controversy and potential settlements would be discouraged. In this case, the trial court would become enmeshed in 150 mini-trials, even after summary judgment, litigation of the timeliness arguments and settlement. The Seventh Circuit correctly declined to sanction the union's notion that the settling class members should be required to prove their case all over again. (Pet. App. A 6)

CONCLUSION.

The union has made no showing of any special or important reason for the issuance of a writ of certiorari. The District Court's decision was a routine application of the principles announced by this Court for determining seniority awards under Title VII and invokes no need for review. The Seventh Circuit correctly concluded that there is "not the slightest basis for concluding that the court abused its discretion." (Pet. App. A 10) The petition for certiorari should be denied.

In addition, the record in this case strongly suggests that the union's appeal and its petition for certiorari are frivolous and were designed to delay (and have delayed since October

* The Seventh Circuit rejected the union's arguments on the ground that a third party is limited to questioning the appropriateness of the § 706(g) remedy, thus rendering it unnecessary to consider these points. However, these are further grounds which support the result reached by the Seventh Circuit.

1977) the class members' re-entry to American's work force.* Respondent accordingly moves that this case be remanded to the Seventh Circuit Court of Appeals for hearing under Rule 38, F. R. A. P.

Respectfully submitted,

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* The union waited until the very last of the 90 days to file its petition for certiorari.

PLAINTIFF-RESPONDENT'S APPENDIX.

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APPENDIX.

UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, Local 550, TWU, AFL-CIO, ET AL., *Plaintiffs,*
vs.
AMERICAN AIRLINES, INC., *Defendant.*
No. 70 C 2069

DARLENE PRESTON, ETC., ET AL., *Plaintiffs,*
vs.
AMERICAN AIRLINES, INC., ET AL., *Defendants.*
No. 72 C 498

DARLENE PRESTON, ET AL., *Plaintiffs,*
vs.
AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, Local 550, TWU, AFL-CIO and AMERICAN AIRLINES, INC., *Defendants.*
No. 74 C 2762

SETTLEMENT AGREEMENT.

I. DEFINITIONS.

As used herein, the following words and phrases shall have the following meanings:

"Lawsuits" shall mean the cases listed in the caption of this Agreement.

"Class" (or "class members") shall mean those persons who comprised the class as heretofore defined in the order entered in Case No. 70 C 2069 on July 16, 1971 who have not opted out.

"Compensation period" shall mean the period of time which commenced upon the termination of a class member's employment and ends on the date on which an order is entered approving this settlement.

"Final Order Date" shall mean the date on which the order described in Section IX becomes final and no longer subject to court review.

"Attorneys for the plaintiff" or similar phrases shall mean Lead Counsel for the Plaintiff Class.

II. Purpose of the Agreement.

This Agreement is entered into between American Airlines, Inc. (hereinafter "American Airlines") and Darlene Preston, the representative of the Plaintiff Class, for the purpose of compromising, settling and terminating all litigation of the above-captioned cases and putting finally to rest all of the claims, issues and questions of fact and law which have or might have been raised on the facts alleged in the pleadings.

The parties hereto agree that the acceptance of this Agreement by American Airlines is not and shall not be construed as an admission by it or deemed to be evidence of the validity of any of such claims or its liability for any thereof or of any unlawful acts by it whatsoever, nor shall this Agreement or any of the terms hereof be offered or received in evidence in any civil or administrative action or proceeding as an indication of wrongdoing by American Airlines or of its legal position in this or other litigation. American Airlines expressly disclaims any liability in these lawsuits and states that it is entering into this Agreement to avoid further expenses, inconvenience and the distraction of burdensome and protracted litigation.

III. Settlement Benefits to be Obtained by Class Members.

In consideration of the execution of the Release described herein and in consideration of the dismissal of these lawsuits against American Airlines in all respects (except, possibly, as to the matters referred to in Section VB), American Airlines hereby covenants and agrees to do the things and perform the acts described herein, at the times and in the manner set forth in this Agreement, all of which shall be subject to the conditions set forth in Sections IX and XI.

A. American Airlines will pay to the class an aggregate amount of Two Million Seven Hundred Thousand Dollars ($2,700,000). After deduction therefrom of all amounts awarded by the Court for plaintiffs' attorneys' fees, costs and expenses of litigation, the net amount will be pro-rated among the class members as provided in Section IV hereof.

B. American Airlines will re-employ all class members who are ready, willing and qualified (as defined in Section VI) to perform the duties required in such re-employment.

C. All re-employed class members shall have, be credited with and enjoy the amount of Seniority and Credit for Length Of Service as provided in Section V hereof.

D. American Airlines will have no monetary or other obligation to any member of the class or to any representative or attorney for the class unless expressly provided in this Agreement.

IV. Payment of Money.

American Airlines will distribute to each member of the class the money payment described in Section IIIA hereof no later than thirty (30) days following the Final Order Date or the date when the class representative furnishes to American Airlines the calculation for each class member as provided hereinafter, which-

ever last occurs; provided further, however, that if by that time the Court has not determined the total amounts of attorneys' fees and expenses, American Airlines will have until thirty (30) days following said determination in which to make the payments to class members. Upon such distribution, American Airlines will provide each class member with a copy of the calculation regarding her payment and will certify to the Court and the attorneys for the plaintiff that all required payments have been duly made. American Airlines' obligation to make employer's F.I.C.A. contributions will be in addition to and independent of the terms of this Agreement.

Distribution of the money paid hereunder shall be made on a pro-rata percentage basis to each class member calculated by the class representative as follows. The amount of base pay which each class member would have earned during the compensation period (except for periods of disability as described in Section VA) shall be reduced by the actual gross earnings during the compensation period. The percentage which each class member's resulting amount bears to the total thus calculated for all class members shall then be applied to the settlement proceeds as calculated pursuant to Section IIIA above and she shall receive the amount calculated thereby, less all appropriate deductions as provided above. For example, if the net total earnings thus calculated to have been "lost" by the entire class during the compensation period is $10,000,000, and a class member's net loss of earnings is $50,000, she will receive one-half of one percent of the net settlement proceeds. The relevant facts and data will be gathered and utilized under the court's supervision and direction.

Unclaimed or unpaid funds, if any, shall be distributed as the Court may direct.

V. Seniority and Credit for Length of Service.

A. Each re-employed class member shall be credited with the amount of company seniority and length of service to which

she was entitled at the date on which her employment was terminated plus company seniority and such length of service for the entire compensation period, except for those periods of time during which she was disabled from working by reason of pregnancy or otherwise. For each pregnancy which terminated in the birth of a child, the period of disability shall be deemed to be nine (9) months. In the event pregnancy was terminated other than by the birth of a child, the period of disability shall be deemed to be the number of weeks of the pregnancy.

B. American Airlines agrees with the class that, subject to the written concurrence of the flight attendants' union, the class members who will be re-employed should be restored to full occupational (union) seniority and credit for length of service to the same extent as is provided in Section VA above. If, however, the union does not concur in writing, it is agreed that the amount of seniority and credit for length of service for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by American Airlines. The Court's award of seniority and credit for length of service will be added to each class member's seniority and credit for length of service to which she was entitled at the time her employment was terminated. The Court's determination will be applied retroactively for all class members who are re-employed after the date of this Agreement but prior to said determination. The class representative and her attorneys agree and covenant diligently to present to the Court the questions and issues involved in the Court's determination of seniority and credit for length of service within a reasonable time after the entry of an order approving the settlement.

VI. Eligibility for Re-Employment

American Airlines agrees to offer to all class members (1) flight attendant retraining for a period of up to six (6) weeks and (2) re-employment as a flight attendant to those class

members who satisfactorily complete such retraining within a period of one (1) year following the Final Order Date. American Airlines will provide retraining classes until the expiration of one (1) year following the Final Order Date. American Airlines will have no obligation to retrain or re-employ any class member following the end of such one (1) year period if such class member has not qualified for such retraining or re-employment, or has elected not to participate in such retraining or to accept such re-employment during such one (1) year period. American Airlines will not discriminate in any way against any class member by virtue of the fact that she is a class member or adopt or enforce any employment practice, condition or qualification which operates to discriminate against any class member as such. Eligible class members shall be re-hired, to the extent practicable and reasonable, at regular intervals during the one (1) year period.

A class member shall be eligible for re-employment if she meets American Airlines' requirements for height, weight, medical examination, completion of retraining, and if she has timely filed the following described Re-Employment Application; provided, however, that no class member shall be eligible for re-employment who has been re-employed after June 1, 1972 and who has been terminated for cause or who has resigned under circumstances which reasonably do not entitle her to be re-employed.

Each class member who desires re-employment shall in writing so indicate by providing the following information on a Re-Employment Application form to be prepared and distributed by plaintiff's attorneys:

A. Name

B. Mailing address, including zip code

C. Approximate date on which she was last employed by American Airlines

D. Preference concerning location of home base

E. The inclusive dates of each pregnancy and the number of children adopted by her

F. Financial information necessary for the calculation described in Section IV

Each class member desiring re-employment shall forward the said form to the attorneys for the plaintiff, who shall then keep one copy for retention in their files and forward one copy to American Airlines. No class member shall be entitled to re-employment under this Agreement unless she completes and returns the aforesaid form to the attorneys for the plaintiff within sixty (60) days after the date of the commencement of the hearing described in Section IX.

Within thirty (30) days after entry by the Court of an order (if any) determining the matters described in Section VB, or within thirty (30) days after expiration of the deadline for filing the Re-Employment Application, whichever is later, American Airlines shall prepare a special list showing the adjusted seniority date of each class member who has applied for re-employment, one copy of which shall be supplied to the attorneys for the class representative. Each class member's Re-Employment Application shall be acknowledged in writing by American Airlines by certified mail, addressed to the class member, advising her of her adjusted seniority date.

VII. Identification of the Class Members

The parties hereto agree that the list of class members attached hereto contains the names and last known addresses of all persons known by either side to be entitled to membership in the Plaintiff Class. In the event any person not listed on the attached list of class members files with the Court (together with service of a copy on the attorneys for the class representative and the attorneys for American Airlines) a sworn petition setting forth sufficient facts to demonstrate entitlement to membership in the class, upon approval by the Court of said petition the person

thus asserting class membership shall be entitled to all the rights and benefits of this Agreement which are then reasonably available; provided, however, that no such petitioner shall be accorded such rights unless such petition is filed with the Clerk of the Court by no later than the 30th day following entry of an order approving this settlement.

VIII. Re-Employment Procedures

For the purpose of retraining applicants for re-employment, American Airlines will conduct retraining classes. In order of seniority, American Airlines will notify each applicant for re-employment (in writing, giving at least thirty (30) days' advance notice) of the commencement date of the retraining class which she is to attend. If the applicant fails within fifteen (15) days after the date of the notice either to accept the offer or provide a reasonable excuse for not accepting, she will forfeit her right to re-employment under this Agreement. Failure to accept any subsequent offer shall forfeit her right to re-employment unless it is due to temporary physical disability or other personal hardship provided, however, any applicant who is excused from attending a retraining class because of personal hardship shall not accrue seniority for any purpose during the period beginning with the first day of the retraining class from which she was excused and ending on the first day of the retraining class which the applicant eventually attends. Any class member who, upon reporting for the retraining class, fails to meet the weight limitations shall be ineligible to attend that class; any such overweight applicant shall, within sixty (60) days thereafter, or by the date of her next retraining class, whichever is later, correct her weight. If she is deemed to have failed the medical examination, she may object to the determination made by the company doctor and obtain review thereof by petition to this Court, filed within sixty (60) days after receipt by her of American Airlines' written advice thereof.

An class member who has been designated to attend the last retraining class to be conducted by American Airlines hereunder shall meet its weight standards and other qualifications no later than the first day of such retraining class or forfeit all rights of re-employment hereunder. All class members who have not accepted retraining for any reason prior to the last retraining class must accept retraining in such class or otherwise forfeit all rights of re-employment hereunder.

Each class member who successfully completes retraining will be permitted to select assignment to a flight attendant base (or bases) of her choice, at which a vacancy exists, provided that no flight attendant having greater seniority desires to fill such vacancy. If a class member is unable to obtain the base assignment she desires, she will be assigned to fill a vacancy at any base selected by American Airlines, except that, the class member may elect to defer re-employment for a period of three months following the end of her retraining or until she is able to obtain assignment to the base of her choice, whichever first occurs, provided, however, at the end of such three-month period such class member must accept re-employment, at a base where a vacancy occurs, beginning with the following calendar month and failure to do so will result in forfeiture of all rights of re-employment.

Upon resumption of duties as a stewardess, each class member shall be provided with the required basic uniforms at American Airlines' expense.

IX. Settlement Procedures

This Settlement Agreement shall be submitted to the Court for its preliminary approval. If the Court grants preliminary approval and deems it a fit and proper Agreement for submission to the processes described in Rule 23(e), F. R. C. P., plaintiff's attorneys will draft all orders, notices and other papers necessary for compliance with the orders and directions of the Court and for the implementation of the procedures required

under Rule 23, F. R. C. P., including a proposed form of notice to class members. All such papers shall be submitted to the attorneys for American Airlines at a reasonable time prior to submission to the Court, in the normal manner applicable to the presentation of any motion or application to the Court. The parties shall jointly file in the Seventh Circuit Court of Appeals a motion and stipulation asking that the currently pending appeals by American Airlines be held in abeyance during the settlement procedures.

Plaintiff shall prepare an alphabetical list of all class members' names. One copy of the notice and one copy of the alphabetized list shall be sent by first-class U. S. mail to each class member.

The costs of notifying the class, including the preparation and reproduction of notice forms and class lists, purchase of envelopes, postage, handling and mailing, shall be borne by plaintiff, to be recovered only if and when the Court shall authorize reimbursement out of the funds paid to the Plaintiff Class in this settlement.

After notice has been distributed to class members and after hearing has been held pursuant thereto, plaintiff and American Airlines will apply to the Court for an order which approves this Settlement Agreement and dismisses these cases against American Airlines. Plaintiff will seek an order which is final and appealable under Rule 54(b), F. R. C. P.

If the Court enters an order in accordance with the foregoing, the Final Order Date, as that term is used in this Agreement, shall be:

A. If no valid notice of appeal is filed within the time prescribed in Rule 4(a), Federal Rules of Appellate Procedure, the date on which the time for filing the notice of appeal expires thereunder.

B. If a valid notice of appeal is filed, the date on which such appeal is dismissed or, if the appeal is not dismissed, the date on which an order is entered which affirms the

District Court's approval of the settlement plus the expiration of time or the occurrence of judicial events which render such order no longer subject to review or modification.

If the District Court enters an order disapproving of this Settlement Agreement and said order is not thereafter reversed or modified so that approval is otherwise obtained, this Agreement shall be null and void and shall have no force or effect.

X. Return of Documents

Within thirty (30) days after the Final Order Date, all documents now in the document depository which were obtained from American Airlines shall be returned to American Airlines.

XI. Quittance Papers

Within seven (7) days after the Final Order Date, plaintiff will deliver to American Airlines a general release in the form attached hereto, signed by Darlene Preston on behalf of herself and all class members, witnessed by two of the lawyers who are of record representing plaintiff in this case, and acknowledged by a notary public. In addition, American Airlines shall have the right to include on the check mailed to each member of the class a general release, and the execution of such release by the class member shall be a condition precedent to the right of the class member to receive any remuneration under this Settlement Agreement.

XII. Exclusivity

Nothing contained in any other agreement or writing and no right or obligation which has arisen or accrued outside of this Settlement Agreement (including prior, current and future labor agreements) shall be deemed to modify, change or diminish the rights and obligations which arise under this Agreement.

XIII. ENFORCEMENT OF THIS AGREEMENT

The order of the District Court approving this settlement shall incorporate and adopt by reference the terms of this Agreement. This Agreement shall be enforceable in the United States District Court for the Northern District of Illinois by virtue of the powers of said Court to enforce its orders and judgments, in addition to any and all other rights and remedies which plaintiff may have under the common law and statutes of the United States and of the several states of the United States.

Dated this 3rd day of August, 1977.

Witnesseth:

/s/ Charles Pressman
Lead Counsel for the Plaintiff Class
GARDNER, CARTON & DOUGLAS

By: /s/ LAURENCE S. CARTON
Attorneys for American Airlines, Inc.

/s/ DARLENE PRESTON
Darlene Preston, Individually and on behalf of the Plaintiff Class
AMERICAN AIRLINES, INC.

By: /s/ CHARLES PASCIUTO

Richard A. Lempert, an officer of American Airlines, Inc., hereby certifies that the above-named signator has the authority to execute this Agreement on behalf of American Airlines, Inc.

/s/ RICHARD A. LEMPERT

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern District

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO et al., *Plaintiffs,* *vs.* AMERICAN AIRLINES, INC., *Defendant.*	No. 70 C 2069
DARLENE PRESTON, etc., et al., *Plaintiffs,* *vs.* AMERICAN AIRLINES, INC., et al., *Defendants.*	No. 72 C 498
DARLENE PRESTON, et al., *Plaintiffs,* *vs.* AIRLINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO AND AMERICAN AIRLINES, INC., *Defendants.*	No. 74 C 2762

NOTICE OF MOTION AND MOTION OF ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, A LABOR ORGANIZATION, TO INTERVENE AND NOTICE OF HEARING ON MOTION OF ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, A LABOR ORGANIZATION, TO INTERVENE

To: All Parties and Their Attorneys of Record

Please Take Notice that on October 3, 1977 at 2:00 P.M. in the Courtroom of the United States District Court for the

Northern District of Illinois, Eastern District located at Federal Building, 219 South Dearborn Street, Chicago, Illinois, 60604, the Association of Professional Flight Attendants, a labor organization, shall move this Honorable Court to grant its Motion to Intervene in the instant action as the representative of 5,400 presently employed flight attendants of American Airlines, Inc., a Defendant herein,

This Motion is based upon the attached Memorandum of Points and Authorities in Support of Motion to Intervene of Association of Professional Flight Attendants, a labor organization, and the affidavit of Colleen Brenner attached hereto.

Dated at Los Angeles, California on the 15th day of September, 1977.

LEVY, KOSZDIN, GOLDSCHMID & SROLOFF
A Professional Corporation
Attorneys for Intervenor

By: /s/ ABE F. LEVY
Abe F. Levy
Lawrence Rosenzweig

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern District

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO et al., *Plaintiffs,* *vs.* AMERICAN AIRLINES, INC., *Defendant.*	No. 70 C 2069
DARLENE PRESTON, etc., et al., *Plaintiffs,* *vs.* AMERICAN AIRLINES, INC., et al., *Defendants.*	No. 72 C 498
DARLENE PRESTON, et al., *Plaintiffs,* *vs.* AIRLINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO AND AMERICAN AIRLINES, INC., *Defendants.*	No. 74 C 2762

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE IN THE INSTANT ACTION MADE BY THE ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, A LABOR ORGANIZATION AND AFFIDAVIT OF COLLEEN BRENNER

I.

The Association of Professional Flight Attendants Is the Presently Designated Collective Bargaining Representative of All Presently Employed Flight Attendants of American Airlines, Inc., a Defendant Herein.

The Association of Professional Flight Attendants (hereinafter referred to as "A. P. F. A.") is a labor organization which has been certified as the collective bargaining representative of all flight attendants employed by American Airlines, Inc. This certification was issued by the National Mediation Board on May 16, 1977 following a representation election conducted by the National Mediation Board pursuant to the provisions of the Railway Labor Act (45 U. S. C. § 151, et seq.).

Pursuant to the provisions of the Railway Labor Act and particularly 45 U. S. C. § 152 (Ninth), the National Mediation Board is given the authority and the duty of determining the collective bargaining representative of employees who are employed by carriers subject to the provisions of the Railway Labor Act. American Airlines, Inc. is a carrier subject to the provisions of the Railway Labor Act. On May 16, 1977 A. P. F. A., after being declared the majority winner of a representation election conducted by the National Mediation Board, was certified as the collective bargaining representative of flight attendants employed by American Airlines, Inc. Further, pursuant to the provisions of the Railway Labor Act, A. P. F. A. became party to, in the place and stead of Transport Workers Union, Local 552, successor to TWU Local 550, a Defendant herein, the then existing and still existing collective bargaining agreement between American Airlines, Inc. and said Transport Workers Union, Local 552.

According to the Railway Labor Act (supra), representation elections may be conducted in mid-term of the life of a

collective bargaining agreement and in the event a challenging labor organization wins the representation election it is declared to be and certified to be the collective bargaining representative of the employees of the carrier (in this case American Airlines, Inc.) and thereafter becomes party to the existing collective bargaining agreement between the Employer and the Union.

A. P. F. A. is, therefore, at the present time the representative of all flight attendants employed by American Airlines, Inc. and seeks, by its Motion to Intervene herein, to bring to the attention of the Court the interests of presently employed flight attendants in the proposed settlement entered into between American Airlines, Inc. and the Plaintiffs herein.

II.

A Certified Collective Bargaining Representative of Employees in a Bargaining Unit Affected by a Settlement or Proposed Compromise of a Class Action Filed Pursuant to the Provisions of Title VII of the Civil Rights Act of 1964 Has the Right to Intervene in Such an Action.

Class action suits, and the instant case is, of course, a class action suit, are governed by Federal Rules of Civil Procedure 23(c)(1) and 24. *McArthur* v. *Southern Airways, Inc.*, 556 F. 2d 298 (5th Cir. 1977). As is pointed out in *Southern Airways, Inc.*, at page 203:

> "*The Advisory Committee's Note to Rule 23*, 39 F. R. D. 98, 107 (1966), sheds little light on the purpose of Rule 23(e). As Judge Simpson noted, however, it serves the 'special prophylactic function' . . . [of assuring] 'that any person whose rights would be affected by dismissal or compromise has the opportunity to contest the proposed action'."

There are approximately 5,400 flight attendants presently employed by the Defendant, American Airlines, Inc. There can

be no question that the approval of the settlement agreement submitted to the Court herein by the parties will have an effect and impact upon all of these presently employed flight attendants. Specifically, the provisions of Article V, *"Seniority and Credit for Length of Service"*, of the Settlement Agreement have a direct impact upon the rights of the presently employed flight attendants of American Airlines and upon the collective bargaining agreement between A. P. F. A. and American Airlines, Inc. (See, also, *United Airlines* v. *McDonald*, ... U. S. ....., 14 FEP Cases 1711, decided June 20, 1977).

III.

This Court Has the Duty and the Obligation to Hear and Consider the Legal Position of the Collective Bargaining Representative of Presently Employed Employees of the Defendant, American Airlines, Inc. Whose "Legitimate Expectations" Will Be Directly Affected by the Proposed Settlement.

Article V entitled *"Seniority and Credit for Length of Service"* of the proposed settlement purports to grant the members of the class, whom the Plaintiffs represent herein, two types of seniority. The first is "company seniority" and the second is "full occupational (union) seniority".

As a matter of fact in Article V, Section B of the proposed settlement the Defendant, American Airlines, Inc., agrees that it will restore to "full occupational (union) seniority" and credit for length of service the members of the class whom the Plaintiffs represent subject to the "written concurrence of the flight attendants union . . ." It is further provided in the same section that:

> "If, however, the Union does not concur in writing, it is agreed that the amount of seniority and credit for length of service for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g) and all other applicable provisions of the law, without contest of objection by American Airlines. The Court's award of seniority and credit for length of service will be added to each class member's seniority and credit for length of service to which she was entitled to at the time her employment was terminated. . . ."

Therefore, under the terms of the proposed settlement, the consent to the flight attendants union is required for the provisions of Article V to become effective. A. P. F. A. is the "flight attendants union" presently representing flight attendants employed by American Airlines and it has not given its written concurrence to the settlement.

As was stated by the United States Supreme Court in *International Brotherhood of Teamsters* v. *United States*, ... U. S. ....., 52 L. Ed. 2d 296 (1977) at page 438:

> "Moreover, after the victims have been identified and their rightful place determined, the District Court will again be faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing."

In making the determination between the rights of the class represented by the Plaintiffs and "other employees innocent of any wrongdoing", the Supreme Court directed, in *Teamsters* v. *U. S.*, 52 L. Ed. 2d 396, 439-440:

> "Although not directly controlled by the Act, the extent to which the legitimate expectations of non-victim employees should determine when victims are restored to their rightful place is limited by basic principles of equity. In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a Court must draw on the 'qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims'." (See cases cited thereunder.) Including quote of Burger, C. J. in *Lemon* v. *Kurtzman*, 411 U. S. 192, 201, 200.

This Court presently does not have before it any entity or any group of individuals who seek or purport to represent the interests of presently employed flight attendants who inevitably will be affected by the terms of the settlement. A. P. F. A. is a proper instrument for the representation of the interests of presently employed flight attendants of American Airlines.

IV.

THE PRESENTLY EXISTING COLLECTIVE BARGAINING AGREEMENT BETWEEN AMERICAN AIRLINES, INC. AND A. P. F. A. DOES NOT PERPETUATE THE PAST DISCRIMINATION COMPLAINED OF BY THE PLAINTIFFS AND HAS NOT DONE SO FOR SOMETIME. THIS HONORABLE COURT, THEREFORE, SHOULD DESIGNATE THE MEANS WHEREBY THE POSITION AND THE INTERESTS OF THE PRESENTLY EMPLOYED FLIGHT ATTENDANTS OF AMERICAN AIRLINES MAY BE PRESENTED TO THE COURT FOR DETERMINATION PURSUANT TO THE PROVISIONS OF SECTION 706(g).

As is established by the affidavit of Colleen Brenner, attached hereto and incorporated herein by reference, the present collective bargaining agreement between A. P. F. A. and American Airlines, Inc. does not perpetuate the past discrimination of Defendant, American Airlines, Inc. As a matter of fact, the provisions of Article 16 entitled "Leaves of Absence" of the current agreement between American Airlines, Inc. and A. P. F. A. specifically provide for pregnancy leaves of absence and contains the following language:

> "(d)(1) Any stewardess who becomes pregnant will immediately upon becoming aware of such pregnancy deliver to the Company a written notice of such pregnancy and there shall be included with such notice a written statement from her doctor specifying the date upon which the doctor first informed the stewardess that she was pregnant and the expected date of delivery. Upon receipt of such notice and statement, the stewardess will be removed

> from active service. Failure to provide such notice and statement shall be a cause for termination of employment.
>
> (2) The written notice required by paragraph 1 hereof shall also contain either the stewardess resignation from employment with the Company, or a request for maternity leave of absence. If the stewardess requests a maternity leave of absence, such leave shall be granted for a period commencing with the date of such request and expiring no sooner than forty-five (45) days, but no later than ninety (90) days, following termination of the pregnancy by birth or no later than five (5) days following termination of pregnancy in another manner, except as provided in paragraphs (3) and (5) below.
>
> (3) A stewardess may be granted an extension of her maternity leave of absence as requested by her personal physician, if approved by the Company's medical examiner, but in no event shall a maternity leave of absence exceed six (6) months after termination of pregnancy by birth or two (2) months after termination in another manner. The procedures of Article 17 shall apply in the event of a disagreement between the Company's medical examiner and the stewardess' personal physician.
>
> (4) A stewardess on maternity leave of absence will give the Company's medical examiner prompt written notice of termination of her pregnancy, including a physician's certificate stating the date and method of such termination. Such information will be confidential physician-to-physician.
>
> (5) A stewardess on maternity leave of absence will, prior to the expiration of her maternity leave of absence, give the Company written notice of her intent to return. The Company will reinstate such stewardess to active service on a date established by the Company provided she satisfactorily passes an appropriate Company medical examination. Failure to give the notices required by paragraphs (4) and (5) or failure to return to active service on the date established by the Company, shall be deemed a voluntary termination of employment.
>
> (6) A stewardess returning from maternity leave of absence shall be required to meet the Company's stewardess

qualifications as they existed on the date the leave of absence commenced, including the prescribed weight standards, before being permitted to return to the line as a stewardess.

(7) A stewardess on maternity leave of absence shall retain and continue to accrue seniority. However, a stewardess shall not accrue vacation or sick leave during the period of the leave, and shall not be eligible for sick leave benefits during such leave.

Provisions for such pregnancy leave have been in the collective bargaining agreement at least since 1970 as set forth in the affidavit of Colleen Brenner attached.

This Court, therefore, has the duty to make decisions as to whether or not the provisions of the collective bargaining agreement set forth immediately above fall within the purview and protection of Section 703(h) of Title VII of the Civil Rights Act, 42 U. S. C. § 2000e-2(h), which provides in part:

"Notwithstanding any other provision of this sub-chapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . or national origin . . ."

See *Teamsters* v. *U. S.*, supra; *United Airlines, Inc.* v. *Evans*, ... U. S. ..... 52 L. Ed. 2d 571, 97 S. Ct. ....., decided May 31, 1977; *McArthur* v. *Southern Airways, Inc.*, F. 2d 298 (5th Cir., 1977); *Stroud* v. *Delta Airlines, Inc.*, 544 F. 2d 892 (5th Cir. 1977). See also, *Franks* v. *Bowman Transportation Company, Inc.*, 424 U. S. 747, 47 L. Ed. 2d 444, 96 S. Ct. 1251 (1976).

V.

The A. P. F. A. Position Concerning the Proposed Settlement.

A. P. F. A. does not come before this Court seeking to contest the approval of the entire settlement made between Plaintiffs and the Defendants. A. P. F. A.'s only interest is to protect and represent the rights of the presently employed flight attendants of American Airlines, Inc. who are working under and pursuant to the provisions of a collective bargaining agreement between Defendant, American Airlines, Inc., and A. P. F. A.

A. P. F. A.'s objection lies solely to the provisions of Article 5 of the settlement dealing with seniority and credit for length of service insofar as that Section will, upon approval of the Court, grant Plaintiffs and the members of the class which Plaintiffs represent seniority rights which supersede, set aside, interfere with or impinge upon the seniority rights accrued by presently employed flight attendants of American Airlines.

A. P. F .A. will present evidence to this Court that will establish the following facts:

1. All currently employed flight attendants of American Airlines, Inc. have accrued certain seniority rights.

2. These seniority rights affect flight attendants in the following manner:

a. Choice of flights.

b. Choice of bases.

c. Order of lay-off in case of reduction of force.

d. Re-hire from lay-off in case of reduction of force.

e. Choice of status such as reserve or non-reserve, international or domestic flights, class of passenger service, rights to leaves of absences, etc.

f. Promotional opportunities.

g. Rates of pay.

Under the current state of the law as defined in *Evans*, supra, *McArthur*, supra, *Teamsters* v. *U. S.*, supra, *Franks* v. *Bowman Transportation, Inc.*, supra, this Court is called upon to make many findings and decisions which directly effect currently employed flight attendants. The effect will be more than just an immediate effect upon return to work of the Plaintiffs and the members of the class whom they represent, but will effect the currently employed flight attendants far into the future. It is therefore incumbent upon this Court to determine the manner and method in which it will proceed pursuant to the provisions of Section 706(g) of the Civil Rights Act to take evidence and make its decisions and determinations of fact.

A. P. F. A. does not have the desire to unnecessarily delay the settlement in this case. A. P. F. A. has no objection to the Court's approval of all the other provisions of the settlement with the exception of Article V. For instance, A. P. F. A. does not object to the payment of the monies to the Plaintiffs and the members of the class Plaintiffs represent, does not object to the members of the class represented by Plaintiffs to be re-employed by American Airlines as flight attendants, being given the opportunity to go through the re-training procedures outlined in the settlement agreement etc. As A. P. F. A. understands the settlement agreement, it does not require that any presently employed flight attendants be terminated, layed-off or severed by American Airlines, Inc. Members of the class represented by Plaintiffs will be re-employed when vacancies occur in flight attendants positions due to "attrition" A. P. F. A. has no objection to this occurring. A. P. F. A., however, does desire an adjudication by this Court concerning the rights of the presently employed flight attendants.

A. P. F. A. does take the position that the provisions of Section 703(h) of Title VII of the Civil Rights Act, (supra) prevent the reinstatement of the Plaintiffs and members of the class represented by the Plaintiffs with seniority in the manner provided

for in the settlement agreement submitted to this Honorable Court. (See, also, *United Airlines* v. *Evans*, supra)

A. P. F. A. contends that the provisions of Section 703(h), supra, are applicable to the situation in this case and that the Plaintiffs and the members of the class that the Plaintiffs represent are entitled to reinstatement, reimbursement for lost wages and other benefits, re-training, etc., but are not entitled to reinstatement with any seniority basis other than the date of their rehire by American Airlines, Inc.

A. P. F. A. further draws the Court's attention to the fact that the evidence will reveal that there exist two separate and distinct types of seniority among flight attendants employed by American Airlines, Inc. One is the equivalent to what Chief Justice Burger described as "benefit" type seniority as distinguished from "competitive" type seniority in *Franks* v. *Bowman Transportation Company, Inc.*, supra, at page 786, 787.

In *Franks* v. *Bowman*, supra, at page 779 and 780, the Court stated:

> "In holding that class based seniority relief for identifiable victims of illegal hiring discrimination is a form of relief generally appropriate under Section 706(g), we do not in any way modify our previously expressed view that the statutory scheme of Title VII 'implicitly recognizes that there may be cases calling for one remedy but not another, and—owing to the structure of Federal Judiciary—these choices are, of course, left in the first instance to the District Courts'. *Albemarle Paper*, 442 U. S., at 416, 45 L. Ed. 2d 280, 95 S. Ct. 2362. Circumstances peculiar to the individual case may, of course, justify the modification or withholding of seniority relief for reasons that would not, if applied generally, undermine the purposes of Title VII." See, also, *United Airlines* v. *Evans*, supra, *Teamsters* v. *U.S.*, supra.

In conclusion, A. P. F. A. respectfully requests that this Court grant its Motion to Intervene herein as a representative of the presently employed flight attendants employed by American Airlines, Inc., the Defendant herein and permit A. P. F. A. to pre-

sent to this Court evidence on behalf of the presently employed flight attendants of American Airlines, Inc. that will, in the opinion of A. P. F. A., convince this Court that the seniority restoration provisions of Article V of the Settlement Agreement should not be approved and that the Court should fashion a remedy pursuant to the provisions of Section 706(g) and (h) of the Civil Rights Act consistent with facts and circumstances and the rights of all parties including the presently employed flight attendants.

A. P. F. A. believes that given the opportunity to present such facts the Court will determine that the Plaintiffs and the members of the class they represent should be re-employed, made whole as to lost back pay and other benefits, but should not receive seniority over and above preceding the seniority held by presently employed flight attendants of American Airlines, Inc.

Respectfully submitted,

LEVY, KOSZDIN, GOLDSCHMID & SROLOFF,
A Professional Corporation,
Attorneys for Intervenor,

/s/ ABE F. LEVY.
Abe F. Levy,
LAWRENCE ROSENZWEIG.

AFFIDAVIT OF COLLEEN BRENNER.

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

COLLEEN BRENNER, being first duly sworn deposes and says:

I am a National Officer of the Association of Professional Flight Attendants, a labor organization. My official title is Division Representative, Eastern Division 1. By virtue of holding this office I am also a member of the Board of Directors of the Association of Professional Flight Attendants. I have held this position since May 16, 1977 when APFA was certified by the National Mediation Board as the collective representative of flight attendants employed by American Airlines, Inc.

Prior to May 16, 1977 and since March, 1962 I have been employed as a flight attendant by American Airlines, Inc. During that period I have been a member of Transport Workers' Union Local 550, AFL-CIO and its successor Transport Workers' Union Local 552, AFL-CIO. For the period between 1962 and May, 1977 I have held various offices in either Local 550 or Local 552. I have been chairperson of the Los Angeles base on behalf of Local 552, have been a member of the Executive Board of Local 552, I have been on the negotiating committee of Local 552.

As a result of my membership in the two TWU locals, Locals 550 and 552 and the various offices I have held in said locals, I have personal knowledge and am familiar with the history of the negotiations and agreements between American Airlines, Inc. and the various locals that have represented flight attendants employed by American Airlines, Inc.

On October 9, 1970, Local 550, TWU, AFL-CIO and American Airlines, Inc. entered into a letter of agreement dealing with the question of stewardesses who become pregnant. This letter of agreement became a part of the general collective bargaining agreement and was attached thereto. The letter of agreement dated October 9, 1970 between American Airlines, Inc.

and Local 550, TWU, AFL-CIO is attached hereto and marked Exhibit "A".

Following the above-referred to letter of agreement chronologically the next general agreement entered into between American Airlines, Inc. and Transport Workers' Union Local 552 (which succeeded Local 550 as the representative of flight attendants employed by American Airlines, Inc.) was an agreement which became effective May 27, 1974. In the agreement of May 27, 1974 there was a section entitled "Article 16—Leaves of Absence". This Article 16 dealt with the question of stewardesses who became pregnant beginning at sub-paragraph (d)(1). The provisions of this section are attached hereto and marked Exhibit "B".

Also attached to the agreement of May 27, 1974 was a letter of agreement referred to as "Appendix L" dated May 27, 1974. This supplemental letter of agreement referred to in the contract as "Appendix L" is attached hereto in its entirety and is marked Exhibit "C".

The above-referred to documents set forth in its entirety the provisions of the collective bargaining agreement between the TWU locals and American Airlines, Inc. except for the current agreement which contains language dealing with stewardesses who became pregnant and their rights and obligations and the terms and provisions of the current agreement are fully set forth in the Memorandum of Points and Authorities in Support of Motion to Intervene filed on behalf of APFA concurrently herewith.

I swear under penalty of perjury that the foregoing is true and correct.

Signed at Los Angeles, California, September 14, 1977.

/s/ COLLEEN BRENNER
Colleen Brenner

Subscribed and sworn to before me, this 14th day of September, 1977.

/s/ HARRIETTE E. TERRY,
Notary Public in and for said County and State.

(SEAL)

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern District

AIRLINE STEWARDS & STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, *Plaintiffs,* *vs.* AMERICAN AIRLINES, INC., *Defendants.*	Consolidated Cases No. 70 C 2069 No. 72 C 498 No. 74 C 2762 No. 70 C 2071

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Frank J. McGarr, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday, October 3, 1977, at the hour of 2:00 o'clock p.m.

Present:

Pressman & Hartunian, Chtd.
(55 East Monroe Street, Room 4005,
Chicago, Illinois, 60603), by
Mr. Charles Pressman and
Mr. Aram A. Hartunian,

and

Levy, Koszdin, Goldschmid & Sroloff, P. C.
(3550 Wilshire Boulevard, Suite 1020,
Los Angeles, California, 90010), by Mr. Lawrence Rosenzweig, appeared on behalf of plaintiffs.

The Clerk: 70 C 2071, consolidated with 70 C 2069, 72 C 498, 74 C 2762; in re: consolidated pre-trial proceedings in the Airline cases for a settlement hearing and for a further status hearing.

The Court: Good morning, Counsel—or good afternoon, as the case may be.

We have a settlement, which the parties seem to agree to. We have some concern evidenced by the Union—who represents the union?

Mr. Rosenzweig: I do, your Honor.

The Court: I don't recall that you have been given leave to intervene.

Mr. Rosenzweig: We filed a motion two or three weeks ago, which is pending at this moment.

The Court: What is your name, for the record?

Mr. Rosenzweig: My name is Lawrence Rosenzweig from the firm of Levy, Koszdin, Goldschmid & Sroloff, in Los Angeles, California.

The Court: It seems, for a complete resolution of the issues that arise out of this proposed settlement, that the Union should have a voice concerning it; so, leave to intervene is granted.

Mr. Rosenzweig: Thank you, your Honor.

The Court: I will hear you with regard to any objections you have to the settlement and, of course, the parties hear the parties who agree to it with any response that they have.

I understood from the Clerk that you might have witnesses?

Mr. Rosenzweig: There are several flight attendants here today.

The Court: I don't know whether it's necessary.

Mr. Rosenzweig: I don't know either.

The Court: I'm not encouraging it.

Mr. Rosenzweig: If we can avoid it, I think we would be better off; if necessary, we can do that.

The Court: What is the basis of your objection to the—in brief oral argument—I have read the memos and I think I know it, but I would like to have you make a statement.

Mr. Rosenzweig: Your Honor, as a preliminary matter, I haven't been admitted to the Bar of this Court, yet; I had arranged for someone to sponsor me, but, apparently, he is involved in the National Labor Relations Board, downstairs.

The Court: Mr. Pressman, can you move his admission?

Mr. Pressman: Yes, your Honor, it would be my pleasure to sponsor Mr. Rosenzweig for admission.

The Court: For this case, you are admitted.

Mr. Rosenzweig: Thank you, your Honor.

With regard to the settlement, the Association of Professional Flight Attendants, which now is the exclusive bargaining representative for the flight attendants employed by American Airlines, is concerned only with one aspect of the settlement—and I think we have indicated that in our papers—we have no problem, whatsoever, with the monetary settlement or any of the other provisions, except the provision of settlement which would bestow upon the plaintiffs their full back-seniority, since the time of the commencement of this lawsuit.

Basically, the problem is that seniority is the key to the working conditions of a flight attendant at American Airlines. All aspects of employment—whether it's vacation schedules, bases, what kind of runs the flight attendant is given—are all based on seniority.

In addition, such things as lay-offs would also be governed by seniority.

We have a situation where we have competing equities. The plaintiffs having been adjudged to be discriminated against have equity on their side; on the other hand, the presently employed flight attendants are innocent wrongdoers—they were not the cause of this discrimination—and the discrimination has been remedied, I believe, since 1970 or so—and we believe that these flight attendants should not be penalized or should not suffer for, because of any discrimination which was suffered by the plaintiffs.

And it is on that basis that we are objecting to that portion of the settlement. We think, at this time, it is particularly important, because in Congress, at this moment, there is a bill—the Kennedy-Cannon Bill—which contemplates deregulation of the airlines and conceivably may lead to lay-offs on American Air-

lines, and those with lesser seniority will be those who will be laid off, if that eventuates.

The Court: Do you have a comment on the number of people in the present class who would be going back to work and, therefore, taking advantage of a seniority provision?

Mr. Rosenzweig: Mr. Pressman has been kind enough to give me some approximation as to what—what numbers those are. If I understand him correctly, his guess is approximately 150 flight attendants would want reinstatement as of Friday, at least.

We still feel that although those people may be spread out among the system, among 5,000 jobs, that that still has a substantial impact upon the system as a whole. The seniority system, itself, we feel is valid and we feel that those presently employed with seniority rights are entitled to keep them. It may be that 150 people is a small percentage of 5,000, yet for those who are affected, it's not something which is minimal for them. And as innocent wrongdoers, we feel they deserve to be protected.

The Court: All right. Any response, Mr. Pressman, that you wish to make?

Mr. Pressman: Your Honor, we have discussed, at length, these points in the briefs that have been furnished you; and I have not heard anything mentioned by counsel here which we haven't addressed ourselves to.

I wonder if your Honor has any particular questions which you would like me to—

The Court: No, I don't have; I just wanted to give each of you an opportunity to make any comment and present any matter that you may have thought not covered by the briefs—but I considered them carefully, and I think I comprehended them completely with the nature of this issue.

Do you agree with the number "150 out of 5,000"—I had a recollection it was a lesser number mentioned in the briefs, but I'm not certain.

Mr. Pressman: Your Honor, the total number to return to work, on the basis of the figures that we have at the present time, were arrived at as follows: there are persons to whom we sent notice, were—I believe—294 members of the class—this number may grow or diminish as time goes on; of these, 87 are at work at the present time under the 1972 agreement—and already have a considerable amount of seniority which they may recover; of the balance we have received returns from the mailing of the notices of 88 forms received back to us, 59 of those persons want re-employment, 16 don't—and of these persons who want—of these 88 forms, 13 are already employed under the 1972 agreement and they were only answering for the purpose. Extrapolating—it seems to us, that there wouldn't be any more than 150 people who would return to work in total. But I might say to your Honor—a point that I didn't make in the brief—that if it were 150 or if it were 300, the amount spread among this large class of persons, who are already employed, really, because of that effect of spreading the burden would be relatively insignificant, I think. There is nobody here whom—who belongs to the Union, who is going to lose a job as a result of this agreement that we propose to your Honor.

As a matter of fact, your Honor will notice in the agreement that we provide that a person in our class who wishes to go back to work will only be assigned to a base when there is an opening in that base and the people will be assigned to that base over a rather lengthy period of time, as openings come up and as training sessions can be arranged for these bases. So that, as we pointed out in our brief, the most important aspect of the job-life for a presently employed stewardess is not going to be disturbed here at all.

The Court: Well, I have given some thought to the matter and I recognize the point that counsel for the Union makes—that any retroactive redressing of a situation is going to produce dislocations for those people who came along later.

I don't think there is an issue of law involved here; I see it as a matter of discretion in this case of what counsel has very aptly

called "competing equities". And I have given thought to the facts and accepted the assurance that nobody is going to lose a job. I think that present employees will suffer somewhat of a set-back or loss in seniority, but, in effect, they will move into positions no worse than if the plaintiff class had not left the airlines in the first place.

So I think, under the circumstances, the equities are on the side of approving the settlement agreement, which I have before me; and having concluded that it is discretionary with me, and finding that it would not be an abuse of discretion to do that, I think it is the best and most equitable result we can achieve in the case.

Over the objection of the Union, I do intend to approve the settlement. So I have here a settlement agreement, which—as I remember it—has been signed—I don't have it with me—in effect, both parties have agreed to it and I will sign it, effective today.

I don't know that there is anything more we have to do. Since I don't have it in front of me and you can't watch me sign it—but I will assure, I will do it as soon as I go back there—

Mr. Pressman: Your Honor, there have been provisions to the settlement agreement, based upon certain equities; you will notice that the settlement agreement leaves open the possibility for revision.

The Court: Yes.

Mr. Pressman: We will hand up to your Honor, as soon as we have a signed revision, which—by both parties, we will hand it up to your Honor for approval.

The Court: I have gone over this copy—which you probably recognize—if there are any significant changes in it, I would like to know.

Mr. Pressman: I think Mr. Hartunian can give you one change.

The Court: All right. What is it?

Mr. Hartunian: There are really two changes, your Honor. Mr. Schure correctly pointed out that the provisions we had

made might work an unfairness on those class members whom we can't find and who may surface within a reasonably short time from now and those people who may not be on the class list, but may be able to prove their entitlement to it in a reasonable time for the purposes of money distribution; once the order becomes final, the mechanism set forth in the agreement goes forward, there is a point at which we are going to make calculations and the airlines will make a distribution of the funds, assuming all costs and expenses have already been adjudicated by your Honor; following that time, there can't be, mechanically, any way to produce for anybody who shows up later on—however, it is our experience, in a number of cases, that undispensed funds, somehow, linger in class actions; if that should occur, rather than simply rest upon the last sentence of Page 6, which leaves to your Honor's discretion, the disbursement of unclaimed funds, by agreement we would both—by that I mean, the defendant and the plaintiffs—would suggest to your Honor that any unclaimed funds be held in an account for a period of one year and that if any class member surfaces—either because she hasn't been notified, because we couldn't find her, or because she is entitled to be on a class list and wasn't, and shows that—that any such persons share, pro rata, at a time one year from now; if there be no such persons who appear and there be no such events, then any unclaimed funds should be distributed to the original class members, pro rata, in the same proportions they originally shared.

The important thing for the airlines is that they will not be required to pay no more money than the total amount they have been called upon in this settlement—which is the 2.7 million dollars, plus the employers Social Security contribution.

Second, with respect to that same problem—vis-a-vis re-employment—any persons who weren't on the list, who are—and we can't find—surface within such time, so that they can give the airlines thirty days' notice prior to the last re-training session—the re-training sessions are to go on for a year—any

such person will be accorded that person's due rights, if that person can show diligence and so forth. So that, even though that person did not receive a notice, she will still be entitled to re-employment like any other class member.

The Court: Those seem equitable provisions, I have no quarrel with those.

All right. Then, whenever you present the agreed, final settlement agreement, I will be glad to approve it, gentlemen. Do you propose to do that today?

Mr. Hartunian: I think we can.

Mr. Pressman: I think so.

The Court: What about the cases not settled, now; what is the status report on those—the other airlines cases that we have not—

Mr. Pressman: T. W. A., your Honor, that is on appeal in the Court of Appeals at the present time; briefs are being written.

The Court: And that's the only other matter, then, that I have to worry about—we will wait until that comes back.

You can drop that off tomorrow, too; but if you want it signed this week, it will have to be before tomorrow—before the end of the day tomorrow, because I'm going out of town.

Thank you, gentlemen. I think it's a good settlement and I congratulate you on it.

(Which were all the proceedings had in the above-entitled cause this date.)

Supreme Court, U.S.
FILED
JUL 11 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1758

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS.

Petitioners,

vs.

AIRLINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, ET AL., AND AMERICAN AIRLINES, INC.,

Respondents.

ANSWER OF RESPONDENT AMERICAN AIRLINES, INC., TO PETITION FOR WRIT OF CERTIORARI.

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ANSWER OF RESPONDENT AMERICAN AIRLINES, INC., TO PETITION FOR WRIT OF CERTIORARI.

American Airlines, Inc., urges the denial of the petition for writ of certiorari to permit the conclusion of this eight-years old litigation in which there have been three earlier appeals, although American changed the challenged practice in 1970. The petition attacks the allowance of occupational seniority under a settlement agreement that compromised a class action brought in 1970 under Title VII of the 1964 Civil Rights Act. Although the settlement agreement provided for occupational seniority for reinstated employees, it stated that, if the union for incumbents did not concur in writing, occupational seniority would "be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by American Airlines". The union did not concur but objected. Despite

American's limited interest, it has opposed and continues to oppose the union's objection, which has delayed the carrying out of the settlement of this protracted litigation.

In the district court the union failed to support its objection. A memorandum on its motion for leave to intervene requested permission to present evidence concerning the effect of occupational seniority on the seniority rights of employed flight attendants. The union represented that the evidence would convince the district court that the seniority restoration provisions of the settlement agreement should not be approved. Yet, at the settlement hearing, union counsel submitted no evidence. Its counsel merely argued that there were competing equities and that the presently employed flight attendants, being innocent wrong-doers, should not be penalized because of any discrimination suffered by the plaintiffs.

The legal questions raised by the union would require the trial of important issues for each settled claim, such as Title VII time limit compliance and willingness to work since termination. In a case such as this, with an estimated 150 class plaintiffs seeking reinstatement, the necessity of such trials would be likely to prevent any settlement that allows occupational seniority even though the effect of the allowance on 5000 incumbents, as the court of appeals said (Pet. Cert. A 7-8) "appeared to be minimal."

In ruling against the union, the district judge stated that the present employees would maintain positions no worse than if the plaintiffs had not left the airline in the first place and that the settlement was the best and most equitable result that could be achieved. The order approving the settlement found it to be a "fair, equitable, and efficient compromise and resolution of the issues" and directed specifically, pursuant to § 706(g) and the settlement agreement, that the re-employed class members should be restored to full occupational seniority. If the allowance of seniority were to have an inequitable effect upon the over 5,000 incumbents, the union representing them would have

had the evidence and would have presented it at the hearing. The district court's discretionary finding was entirely proper as a result of the union's failure to support its objection by contrary evidence. The court of appeals was emphatic in affirming the district court's finding:

> "On the record before us, we find not the slightest basis for concluding that the court abused its discretion" (Pet. Cert. A10).

CONCLUSION.

Respondent American Airlines, Inc., urges the denial of the certiorari petition.

Respectfully submitted,

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